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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-333

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, *Petitioner,*

vs.

UNITED STATES OF AMERICA and ETHEL OLSON and LILLIAN SEARLE as Co-Administratrices of the Estate of Sarilla L. Whitlock, Deceased, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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UNITED STATES OF AMERICA and ETHEL OLSON and LILLIAN SEARLE as Co-Administratrices of the Estate of Sarilla L. Whitlock, Deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner Bank of America National Trust and Savings Association, a national banking association, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on Febru-

ary 19, 1971. Such judgment of the Court of Claims was entered upon motion for summary judgment in favor of Ethel Olson and Lillian Searle as Co-Administratrices of the Estate of Sarilla L. Whitlock, Deceased, against United States of America and in favor of United States of America over against Bank of America National Trust and Savings Association, Security Pacific National Bank and Security National Bank. This Petition is on behalf of Bank of America National Trust and Savings Association, but the positions of Security Pacific National Bank and Security National Bank under such judgment are substantially the same.

OPINION BELOW

The opinion of the Court of Claims is reported at 437 F.2d 981 (1971), and appears in the Appendix hereto (App. i).

JURISDICTION

The judgment of the Court of Claims was entered on February 19, 1971. Within thirty (30) days of that date, Bank of America National Trust and Savings Association filed a motion in the Court of Claims for rehearing to alter judgment as permitted by Court of Claims Rule 151. Said motion was denied on June 11, 1971, and this petition was filed within ninety (90) days of that date. The Court's jurisdiction is invoked under 28 United States Code Section 1255(1).

QUESTIONS PRESENTED

1. Whether all powers and authority previously granted to a California conservator are automatically terminated by the conservator's unauthorized sale or exchange of conservatorship property.

2. Whether the power of a California conservator to endorse any check must be specially granted by court order and set forth on the face of his letters of conservatorship.

3. Whether endorsement of four Treasury checks by the conservator of the person and estate of the named payee is a forgery within the meaning of the Check Forgery Insurance Fund because the conservator was without authority to redeem the United States Savings Bonds which resulted in the issuance of such checks.

STATUTORY PROVISIONS INVOLVED

Section 562 of Title 31, United States Code, Sections 1802 and 541.1, 1500, 1501, 1513, 1755, 1801, 1852, 1853, 1855, 1858, 1951 and 1952 of the Probate Code of the State of California (hereinafter called Probate Code) are set forth in the Appendix hereto (App. xvi).

STATEMENT OF THE CASE

This is an action involving a claim against the Check Forgery Insurance Fund under 31 U.S. Code Sections 561 through 564 and 31 C.F.R. Sections 359.0

through 359.4. Plaintiffs had previously filed their claim with the Treasurer of the United States but the claim was disallowed and the Comptroller General denied their appeal. Of the four conditions to be met before recovery will be allowed under the Check Forgery Insurance Fund, only the requirement that checks be negotiated and paid by the Treasurer on forged endorsements was in issue. (31 C.F.R. Section 359.2). Plaintiffs contend that Mr. Houlihan, as conservator of the Estate of Sarilla L. Whitlock, had no authority to endorse four Treasury checks. In response to plaintiffs' petition filed with the Court of Claims, defendant United States filed contingent cross-claims against the three banks who had presented the Treasury checks to the Treasurer of the United States for payment. One of these banks is the Petitioner herein, Bank of America National Trust and Savings Association (hereinafter called Bank of America). The Court of Claims entered judgment for plaintiffs on their motion for summary judgment, and also entered judgment for defendant United States over against the three presenting banks on the basis of their guaranties of prior endorsements under 31 C.F.R. Section 360.4. The parties did not dispute the material facts which may be summarized as follows:

On April 28, 1961, the Superior Court of the State of California, County of Alameda, issued and filed its order appointing John C. Houlihan conservator of the person and estate of Sarilla L. Whitlock, at the same time requiring a surety bond in the amount of $150,000.00. On May 25, 1961, Mr. Houlihan petitioned

the Superior Court for reduction of the bond to $50,000.00 on the representation that he would deposit certain U.S. Savings Bonds with United California Bank, subject to withdrawal only upon further order of the Court. On May 25, 1961, the Superior Court vacated and set aside its order of April 28, 1961, and ordered that letters of conservatorship be issued to Mr. Houlihan upon his posting a surety bond in the amount of $50,000.00. Also on May 25, 1961, the actual letters of conservatorship were filed and issued to Mr. Houlihan.

The Superior Court never specifically ordered Mr. Houlihan to deposit savings bonds in United California Bank, and never required an acknowledgment from United California Bank that such had been done as would be authorized under Sections 1802 and 541.1 of the *Probate Code,* and Mr. Houlihan failed to make the deposit on his own. Instead, Mr. Houlihan proceeded to redeem the bonds without requesting court approval, and apparently without Mrs. Whitlock's knowledge or consent.

On March 12, 1963, Mr. Houlihan presented three of the savings bonds to American Trust Company (now Wells Fargo Bank) for redemption. Each bond bore an endorsement of the payee, Mrs. Sarilla L. Whitlock, and the additional hand-written legend at the side of such endorsement, "Signature guaranteed, John C. Houlihan." Two Treasury checks were issued as a result of such redemption: Number 100898 dated March 29, 1963, in the sum of $5,062.50, and Number 101545 dated May 1, 1963, in the sum of $20,000.00,

each check made payable to "Mrs. Sarilla L. Whitlock." Both checks were separately deposited in Mr. Houlihan's personal account at the Oakland Main Office of Bank of America. At the time of each deposit, the account was overdrawn. Both checks were endorsed "Sarilla L. Whitlock" without more.

On June 30, 1964, Mr. Houlihan presented three more savings bonds to the Oakland Office of Wells Fargo Bank for redemption. Each bond bore an endorsement of the payee, Mrs. Sarilla L. Whitlock but no additional legend at the side as with the other three bonds. Two Treasury checks were issued as a result of such redemption: Number 123955 dated August 1, 1964, in the sum of $15,000.00, and Number 123888 dated August 1, 1964, in the sum of $9,740.00, each check made payable to "Mrs. Sarilla L. Whitlock." Check Number 123955 was deposited in an account maintained by Mr. Houlihan for the Estate of John Joseph Betmon at the First National Bank of Oakland (now Security National Bank) and check Number 123888 was deposited in Mr. Houlihan's personal account at the Oakland Main Office of the Bank of America which at the time was overdrawn. Both checks were endorsed "Mrs. Sarilla L. Whitlock" and then "John C. Houlihan" without more.

All four Treasury checks were presented to the Treasurer of the United States for payment and they were honored and paid. Each of the checks was endorsed by the presenting bank (checks numbered 123888, 100898 and 101545 by Bank of America, and check Number 123955 by Pacific National Bank [now

Security Pacific National Bank]). Check Number 123955 also bore the prior endorsement of First National Bank of Oakland (now Security National Bank).

Mr. Houlihan's letters of conservatorship were never revoked. After Mrs. Whitlock's death in 1965, however, Mr. Houlihan was unable to account as conservator for the substantial decrease in the value of the conservatorship estate. On April 28, 1966, the Grand Jury of the County of Alameda returned an indictment against Mr. Houlihan, and he subsequently pleaded guilty to the charge of felony grand theft and was sentenced to a term in state prison. The heirs of Mrs. Whitlock then commenced prosecution of this claim against the Check Forgery Insurance Fund.

REASONS FOR ALLOWING THE WRIT

1. The decision below is inconsistent with applicable California law governing the authority of conservators.

The Court of Claims held that Mr. Houlihan had no authority to cash or endorse the Treasury checks because (1) the Superior Court had reduced the conservatorship bond on the representation by Mr. Houlihan that he would deposit certain savings bonds with United California Bank, and (2) the power to endorse these checks is an "additional power" derived from Section 1853 of the *Probate Code*. Both positions are inconsistent with California law.

(a) The powers and authority of a California conservator cannot be terminated other than in the manner specified by statute.

Mr. Houlihan was issued letters of conservatorship on May 25, 1961. Such letters are the official evidence that the conservator has been appointed by the Superior Court. *Probate Code,* Section 1801. In the absence of a direct attack made in due time and in proper form, it is presumed that proper appointment proceedings were had, and the appointing order will be treated as valid. *In re Kandarian,* 187 Cal. 479, 202 P. 647 (1921). Likewise, where no want of jurisdiction is disclosed on the face of the record, an order appointing a guardian (and by analogy a conservator) is not subject to collateral attack. *Guardianship of Kimball,* 80 Cal. App. 2d 884, 182 P.2d 612 (1947).

Every conservatorship continues until the authority of the conservator is terminated by the death of the conservator or conservatee, or by order of court. *Probate Code,* Section 1755. Every conservator of the person and the estate of a conservatee has the same general powers granted to a guardian of the person and estate of an incompetent. *Probate Code,* Sections 1500 to 1540 as incorporated by Section 1852. A conservator, however appointed, may be removed by the appointing court for abuse of his trust, waste, or mismanagement. *Probate Code,* Section 1951. The appointing court may compel the conservator to surrender the estate of the conservatee, and may suspend the powers of the conservator to such extent as the court deems necessary. *Probate Code,* Section 1952. The grounds for removal of a guardian (*Probate*

Code, Section 1580) are the same as those for removal of a conservator under Section 1951. Letters of guardianship cannot be revoked for any other than the reasons specified by statute. *Estate of Atkins,* 121 Cal. App. 251, 8 P.2d 1052 (1932). Therefore, during the time in question, Mr. Houlihan was possessed of those general powers granted by statute to every California conservator. Misrepresentations made to the Superior Court by Mr. Houlihan in connection with the reduction of his bond could not suspend or terminate those general powers.

(b) The power of a California conservator to endorse checks is a general power, not a special power.

The authority of a California conservator to endorse checks on behalf of his conservatee is derived from *Probate Code,* Section 1852, not Section 1853. Section 1852 incorporates Section 1513 which empowers a conservator to deposit any money with one or more banks in California and, unless deposited pursuant to court order to withdraw such money without order of court. Similar rights are given to California executors and administrators. *Probate Code,* Section 585. No distinction is made between savings and checking accounts. *In re Smith's Estate,* 112 Cal. App. 680, 297 P. 927 (1931). The right of a guardian to draw checks on the account of his ward has long been recognized. *Southern Trust and Commerce Bank v. San Diego Savings Bank,* 45 Cal. App. 294, 187 P. 435 (1919). Section 1852 also incorporates general powers and duties which could not be exercised and discharged without the incidental right to

make and endorse checks. A conservator of the person and estate of a conservatee has the care and custody of the person of his conservatee and the management of his estate until legally discharged. *Probate Code,* Section 1500. He must pay just debts out of the estate, and must demand; sue for, and collect all debts due to the conservatee. *Probate Code,* Section 1501. Somewhat overlapping Section 1501, *Probate Code,* Section 1858 directs every conservator to pay debts and expenses of the conservatee and the conservatorship, and grants every conservator the right to advance funds for the benefit of the conservatee of his estate and to reimburse himself for such advances out of the income and principal of the estate. In addition, every conservator must provide for the maintenance and support of the conservatee. *Probate Code,* Section 1855. It is unclear whether the opinion of the Court of Claims holds that (1) endorsement of *any* check by a conservator must be approved pursuant to *Probate Code,* Section 1853, or (2) the authority of a conservator to endorse checks is dependent upon his power to enter into the transaction which resulted in the issuance of such checks. However, both positions are contrary to the authorities already cited. A conservator cannot be deprived of his statutory obligation to care for the estate; he still remains liable on his surety bond for safekeeping of the assets. *DeGreayer v. Superior Court,* 117 Cal. 640, 49 P. 983 (1897).

2. The decision below raises important questions of federal law concerning the endorsement of Treasury checks.

The Court of Claims held that endorsement of four Treasury checks by the conservator was a forgery within the meaning of the Check Forgery Insurance Fund statute. 31 *U.S. Code,* Section 562. No reported case deals directly with the definition of forged endorsement under this statute. However, *Oquendo v. Federal Reserve Bank of New York,* 98 F.2d 708 (1938) is factually analogous to the present situation. There, the Court of Appeals for the Second Circuit said that even if an agent were carrying out a scheme to defraud his principal, the agent's endorsement of a Treasury check made payable to his principal would not terminate his authority and render the endorsement a forgery. The Court of Claims has ignored *Oquendo* and reasoned that since Mr. Houlihan, as conservator, had no authority to redeem certain savings bonds, he had no authority to endorse the Treasury checks representing the proceeds of such bonds.

The Check Forgery Insurance Fund should not be used as insurance for injuries caused by the general misappropriations of a conservator. Banks and others who cash Treasury checks would be put under an unconscionable burden to investigate the totality of circumstances which led to the issuance of such checks and the very negotiability of Treasury checks would be placed in jeopardy. Because it is important to preserve the integrity of Treasury checks and also essential that banks have definitive rules and guide-

lines as to endorsement of Treasury checks, the questions raised should be decided by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Claims.

August 30, 1971.

Respectfully submitted,

ROBERT H. FABIAN,
CHARLES E. COOPER,
Attorneys for Petitioner.

THEODORE SACHSMAN,
Of Counsel.

(Appendix Follows)

Appendix

In the United States Court of Claims
No. 172-69
(Decided February 19, 1971)

Ethel Olson and Lillian Searle, as co-administratrices of the Estate of Sarilla L. Whitlock, deceased v. The United States, defendant; Bank of America National Trust and Savings Association, Security Pacific National Bank, and Security National Bank of Oakland, third-party defendants.

Robert C. Field, attorney of record, for plaintiff. *David M. Lightner,* of counsel.

J. Lawrence Heizmann, with whom was *Assistant Attorney General William D. Ruckelshaus,* for defendant.

Theodore Sachsman, for Bank of America National Trust and Savings Association. *Neal L. Petersen,* attorney of record. *Charles E. Cooper,* of counsel.

Francis C. Higham, Jr., attorney of record for Security Pacific National Bank. *Michael H. Smithwick,* of counsel.

Thomas A. Stark, attorney of record for Security National Bank of Oakland.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges.*

On defendant's motion for Summary Judgment and plaintiffs' motion for Summary Judgment.

SKELTON, *Judge,* delivered the opinion of the court:

This is an action involving a claim against the Check Forgery Insurance Fund under 31 U.S.C. §§ 561, 564 (1964) and 31 C.F.R. §§ 359.0-359.4. Plaintiffs in this suit are the co-administratrices of the estate of Sarilla L. Whitlock, deceased.

In October 1960, Mrs. Whitlock, a widow, who resided in Alameda County, California, fell and injured her hip. Thereafter, she was confined to a convalescent hospital until her death in 1965. On April 28, 1961, John C. Houlihan, her attorney, obtained an order from the Superior Court of California, appointing him the conservator of her estate with a security bond of $150,000 being required by the court. On May 25, 1961, Mr. Houlihan had the amount of the bond reduced by the court to $50,000, on the representation in his petition to the court that he would deposit certain of Mrs. Whitlock's U.S. Savings Bonds with the United California Bank, subject to withdrawal *only* upon order of the court. This supposedly was for the purpose of saving the conservatee approximately fifty percent of the cost of the bond. Among the savings bonds to be deposited were those whose proceeds are involved here. However, Mr. Houlihan failed to deposit the bonds after the court reduced his bond on said condition. Instead he redeemed the bonds without court authorization and without Mrs. Whitlock's knowledge and appropriated the proceeds amounting to $49,802.50 to his own use.

The bonds were redeemed over a period of time. First, on March 12, 1963, Mr. Houlihan, representing himself as Mrs. Whitlock's attorney, presented for redemption to the American Trust Company (now Wells Fargo Bank) one Series G bond for $5,000 and two Series H bonds, each for $10,000. He gave instructions that the Treasury checks to be issued in redemption of the bonds should be sent to the address of an apartment formerly occupied by Mrs. Whitlock. Pursuant to these instructions, two Treasury checks No. 100898, dated March 29, 1963, in the sum of $5,062.50 and No. 101545, dated May 1, 1963, in the sum of $20,000, were mailed to Mrs. Whitlock at such address. Both checks were thereafter obtained by Mr. Houlihan without Mrs. Whitlock's knowledge or consent and were endorsed by him in blank with an imitated signature of Mrs. Whitlock. They were then separately deposited in Mr. Houlihan's personal account at the Oakland Main Office of the Bank of America. At the time of these deposits, the account was overdrawn in excess of $1,500.

On June 30, 1964, Mr. Houlihan presented for redemption to the Oakland Office of the Wells Fargo Bank three more of Mrs. Whitlock's U.S. Savings Bonds without court order and without the knowledge or consent of Mrs. Whitlock. The bonds presented were two Series H bonds of $10,000 and $5,000, respectively, and one Series K bond of $10,000. Similar instructions were given this bank concerning the mailing of the Treasury checks. Two Treasury checks, No. 123955, dated August 1, 1964, for $15,000 and No. 123888, dated August 1, 1964, for $9,740, representing

the proceeds of the three bonds were issued and mailed to the specified address. Both checks were later obtained by Mr. Houlihan without Mrs. Whitlock's knowledge or consent and were endorsed in blank by him with a forged signature of Mrs. Whitlock. Also, both contained a second endorsement in blank of Mr. Houlihan. Check No. 123955 for $15,000 was deposited with the First National Bank of Oakland in the account of the Estate of John Joseph Betmon, deceased, to cover prior misappropriations by Mr. Houlihan from that estate. The other check in the sum of $9,740 was deposited in Mr. Houlihan's personal account at the Oakland Main Office of the Bank of America at a time when the account was overdrawn by more than $1,600.

The Bank of America, after deposit by Houlihan, presented the three checks Nos. 101545; 100898; and 123888 totaling $34,802.50, to the United States Treasury for payment. Thereafter, these checks were honored and paid by the Treasury. The other check, No. 123955, followed a more involved path. It was negotiated by Mr. Houlihan at the First National Bank of Oakland. The Security National Bank is the successor in interest to said First National Bank of Oakland. This check was presented to the Treasury of the United States for payment by the Pacific National Bank, a later endorsee. The Security Pacific National Bank is the successor in interest to the said Pacific National Bank. Each of the four checks involved bore the endorsement of the presenting bank and check No. 123955 bore the additional endorsement of the First National Bank of Oakland.

Subsequent to Mrs. Whitlock's death in 1965, the heirs of Mrs. Whitlock learned of Mr. Houlihan's mishandling of her estate. On April 28, 1966, an indictment was returned against Mr. Houlihan, who subsequently pleaded guilty to the charge of felony grand theft with reference to Mrs. Whitlock's estate, and was convicted and sentenced to the State Prison for a term of years. In the Grand Jury proceedings, James V. Conway, Federal Postal Inspector and Examiner of Questioned Documents, characterized the endorsements of the four Treasury checks as obvious attempts to imitate the signature of the decedent.

By letter of March 6, 1967, plaintiffs filed a claim with the Treasurer of the United States against the Check Forgery Insurance Fund, claiming that Mr. Houlihan had acted without authority and that pursuant to the provisions of the Check Forgery Insurance Fund, 31 U.S.C. §§ 561, 564 (1964), they were entitled to be reimbursed for the value of the checks that the United States had paid on a forged endorsement by Mr. Houlihan in the sum of $49,802.50. This claim was disallowed by the Treasury on September 27, 1967. Plaintiffs appealed to the Comptroller General who denied their appeal on June 21, 1968. Thereafter, on March 28, 1969, plaintiffs filed their petition with this court. Defendant has filed contingent cross claims against three third-party defendants, the Bank of America, the Security Pacific National Bank (successor in interest to the Pacific National Bank), and the Security National Bank of Oakland (successor in interest to the First National Bank of Oakland), claiming that in the event defendant is liable to plain-

tiffs, then the government should have judgment over against these three third-party defendants. In this regard, Security Pacific National Bank admitted that under 31 C.F.R. § 360.4, it, as presenting bank, guaranteed to the Treasurer of the United States the genuineness of prior endorsements.

To recover from the Check Forgery Insurance Fund, four conditions must be met, as set out in 31 C.F.R. § 359.2, which are: (a) that the check has been lost or stolen without the fault of the payee or special endorsee; (b) that the check has thereafter been negotiated and paid by the Treasurer on a forged endorsement of the payee's or special endorsee's name; (c) that the payee or special endorsee has not participated either directly or indirectly in the proceeds of such negotiation or payment; and (d) that reclamation has been or may be delayed more than 10 days, or be unsuccessful. It is obvious that prerequisites of recovery (a), (c), and (d) are met. Requirement (b) is in issue in this case. The defendant and third-party defendant, Bank of America, claim that requirement (b) has not been complied with, contending that Mr. Houlihan had authority to sign Mrs. Whitlock's name and therefore Mr. Houlihan's signing of her name was not a forgery. Thus, the decision in this case revolves around the issue of whether Mr. Houlihan, as conservator of the Estate of Mrs. Sarilla L. Whitlock, had the authority to redeem the bonds and to cash the checks issued in redemption thereof.

We find that he did not have such authority, both because of the court order reducing the conservator-

ship bond on the conditions outlined above, and because of California law governing the authority of conservators. The specific order of the court reducing the conservatorship bond was based on Mr. Houlihan's express representations in his petition for reduction of the bond that he would deposit the bonds in the United California Bank of Oakland, "subject to withdrawal *only* upon further order of this Court." Thus, Mr. Houlihan had no authority with respect to the bonds except to deposit them in the United California Bank. He had no authority whatsoever to redeem the bonds except by order of the court. In fact, he had no authority even to have them in his possession. Therefore, the redemption of the bonds and the endorsement of the checks representing the proceeds of the bonds were in direct violation of the conditions upon which the court based its order reducing the bond.

Furthermore, Mr. Houlihan had no authority under general California law governing the authority of conservators to redeem the bonds and endorse the checks representing the proceeds thereof without a court order. The powers and duties of a conservator are set forth in Chapter 4 of Division V of the California Probate Code, Sections 1851 through 1861. Section 1852 defines generally the powers of a conservator. It grants to the conservator the same powers as are given to a guardian plus additional powers which may be exercised only by court order. Section 1852 reads as follows:

> Every conservator of the estate or of the person and estate of a conservatee shall have the powers

granted to a guardian of the estate or of the person and estate of an incompetent * * * and if granted by the court, the additional powers authorized by Sec. 1853 of this Code.

Section 1853 provides in pertinent part as follows:

On the application of the conservator, made at any time, which application may be included in a petition filed pursuant to Sec. 1754 of this Code, the court may grant to a conservator of the estate or of the person and estate of a conservatee, the following additional powers, which may be exercised with or without notice, hearing, confirmation, or approval of the court;

* * * [T]o take, collect and hold the property of the conservatee; to contract for the conservatorship and to perform outstanding contracts and thereby bind the conservatorship estate; * * * to sell at public or private sale; * * * to exchange conservatorship property; * * *

Said additional powers shall be in addition to general powers of conservators. The granting of said additional powers shall be discretionary with the court. Notice of the hearing of the application therefor, except when the application is included in a petition filed pursuant to Sec. 1754 of this Code, shall be given in the manner provided in Sec. 1200 of this Code * * * When additional powers are granted to a conservator, his letter shall state that he has the powers authorized in this section. If such additional powers are granted by a subsequent order, new letters shall be issued and shall state that he has such power or powers as have been granted. * * *

The additional powers listed in Section 1853 are extensive and would seem to give a conservator the authority to redeem his conservatee's bonds, but only on the following conditions. In order to exercise such powers an order of the probate court is required, after application, notice, and hearing. Also, these additional powers must be set forth on the face of the letters of conservatorship. California Probate Code § 1853. These requirements were not complied with and no such additional powers were granted to Mr. Houlihan by the court. Furthermore, no such additional powers were set forth on the face of the letters of conservatorship. Therefore, Mr. Houlihan derived no authority from section 1853.

As shown above, the powers to take, collect, and hold the property of the conservatee; to sell conservatorship property; and to exchange conservatorship property are powers specifically enumerated for conservators under the additional powers provision of section 1853. We think these provisions are controlling because they cover the specific acts of Houlihan in redeeming the bonds and cashing the checks. Therefore, we do not need to consider the general powers granted to a conservator under section 1852 and related sections of the California Probate Code dealing with the general powers of a guardian. The clear import of sections 1852 and 1853, read together, is that the general powers given by section 1852 do not encompass the powers listed specifically under section 1853. In other words, powers would not be given under section 1853 if they had already been granted in sec-

tion 1852. Thus, since the authority to redeem bonds and cash checks is derived from section 1853, it cannot be derived from section 1852. However, even if we examine the guardianship provisions incorporated by section 1852, they do not aid the defendant, as will be shown below.

The general powers and duties of a guardian are found in Division IV, Chapters 7 and 8 of the California Probate Code, Sections 1500 through 1540. None of these sections give a guardian the right to sell or redeem bonds and to cash the checks issued in payment thereof without a court order or without court approval. In fact, the sections in point specifically require court approval. Section 1530 reads in part as follows:

> If the income of an estate under guardianship is insufficient for the support, maintenance and education of a ward * * * or if the personal estate and the income from the real estate is insufficient to pay his debts, or if it is for the advantage, benefit and best interest of the estate or ward * * *. [H]is guardian may sell any of his real or personal property, or mortgage or give a deed of trust upon any of his real property for any such purposes, *subject to authorization, confirmation or direction by the Court as hereinafter provided.* [Emphasis supplied.]

Not only did Mr. Houlihan fail to obtain court authorization, but it also appeared that there was no insufficiency of income for the support of Mrs. Whitlock as a basis for such authorization as contemplated by the statute. Likewise, an exchange of property by

the conservator, acting under general guardianship powers would require court approval under section 1540, which reads in part:

> When property can be exchanged to the advantage and best interest of the ward and such members of his family as he is legally bound to support and maintain, *after hearing before the court,* conveyances to effectuate such exchange may be executed to the person with whom such exchange is made, by the guardian * * *. [Emphasis supplied.]

California Appellate Courts have interpreted the law to mean that court approval is necessary to give a guardian authority to sell the property of his ward. In *Katz v. Greeninger,* 96 Cal. App. 2d 245, 215 P. 2d 121 (1950), the court said, "While the guardian has the right of possession and control, the property is said to be 'in custodia legis' and subject to the orders of the court." [*Id.* at 124.] The court there adopted the view that a guardian is without power, in the absence of a court order, to withdraw funds from the ward's estate if the withdrawal is not needed for the support of the ward. Redemption of the bonds in the present case was not needed for the support of Mrs. Whitlock. Her average monthly income during the conservatorship proceeding was $850, while the average monthly expenditures were $500. The court in *Katz,* though, went further in saying, "But even in those cases which permit a withdrawal for maintenance the better reasoned ones tie the power of the guardian to the supervision and control of the court." [*Id.* at 124.] Also, in *Guardianship of Wood,* 193 Cal.

App. 2d 260, 14 Cal. Rptr. 147, 151 (1961), the court stated, "If the income from the ward's property then became insufficient for the ward's support and maintenance, the guardian's remedy consisted of an application to the court; she could sell any of the ward's real or personal property *'subject to authorization, confirmation or direction by the court'* * * *." (Probate Code 6 1530.)

The foregoing authorities demonstrate that under California law, Mr. Houlihan, as conservator, had no authority without a court order or confirmation to redeem the savings bonds of his conservatee and to endorse the conservatee's name on the checks representing the proceeds from such bonds. Not only did Mr. Houlihan fail to obtain court approval for the redemption of the bonds, but also he acted in direct violation of the condition under which the court reduced the conservatorship bond. Therefore, his imitation of Mrs. Whitlock's signature was clearly a forgery—satisfying requirement (b) of the Check Forgery Insurance Fund statute. Thus, the facts of this case clearly support the plaintiffs' claim, as all four of the prerequisites for recovery from the Check Forgery Insurance Fund are met. Plaintiffs' motion for summary judgment is granted and judgment is entered in favor of the plaintiffs against the United States in the sum of $49,802.50.

The United States is entitled to judgment over against the Third Party Defendant Banks. These banks by endorsing and presenting the checks to the Treasurer for payment guaranteed to the Treasurer

that all prior endorsements were genuine. This was true whether or not an express guarantee was placed on the check.[1] This is unequivocally set out in 31 C.F.R. § 360.4 (1970):[2]

> § 360.4 *Guaranty of Indorsements.*
>
> The presenting bank and the indorsers of a check presented to the Treasurer for payment are deemed to guarantee to the Treasurer that all prior indorsements are genuine, whether or not an express guaranty is placed on the check. When the first indorsement has been made by one other than the payee personally, the presenting bank and the indorsers are deemed to guarantee to the Treasurer, in addition to other warranties, that the person who so indorsed had unqualified capacity and authority to indorse the check in behalf of the payee.[3]

In regard to this, Security Pacific National Bank stated:

> Under the provisions of 31 C.F.R. 360.4 Security Pacific National Bank, as presenting bank, and Security National Bank, as endorser, both guaranteed to the Treasurer of the United States the genuineness of prior endorsements. * * *

---

[1] In this case an express guarantee was placed on each of the checks. The three checks presented by the Bank of America contain the legend "PAY ANY BANK-P.E.G.-BANK OF AMERICA." The check presented by Pacific National Bank contains the same legend over the endorsement of the First National Bank of Oakland and Pacific National Bank. "P.E.G." is a standard abbreviation for "prior endorsements guaranteed."

[2] This provision is basically the same as 31 C.F.R. § 360.2 (1959) which was in effect when the checks in issue were negotiated.

[3] See also 31 C.F.R. § 202.25(e) (iii) (1959).

It was stated in *National Metropolitan Bank v. United States*, 323 U.S. 454 (1945), that the Treasury Regulations have made the guarantee of prior endorsements by a presenting bank a prerequisite to payment. Also, in that case the Supreme Court in speaking of its prior holding in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) said:

> * * * There we held that presentation of a Government check to it for payment with an express guaranty of prior endorsements amounts to a warranty that the signature of the payee was not forged, but genuine. Breach of that warranty, we said, by presenting a check on which the payee's signature is a forgery, gives the Government a right to recover from the guarantor when payment is made. * * * [*Id.* at 456.]

Thus, it is well recognized that presenting banks and endorsee banks guarantee to the Treasury that all prior endorsements on checks are genuine.

Accordingly, judgment is entered for the United States against the Bank of America National Trust and Savings Association for $34,802.50, and against the Security Pacific National Bank and the Security National Bank jointly for $15,000.

In conclusion, as set forth above, plaintiffs' motion for summary judgment is granted and judgment is entered for plaintiffs in the sum of $49,802.50 against the defendant. Also, defendant's motion for summary judgment is granted as set forth above and judgment is entered in favor of defendant against the Bank of America National Trust and Savings Association for $34,802.50, and against the Security Pacific National

Bank and the Security National Bank jointly, for $15,000.

TITLE 31 UNITED STATES CODE

§ 562. *Payments from fund to payees, etc., of lost or stolen checks on United States paid on forged indorsements*

Whenever it is established (a) that any check heretofore or hereafter drawn on the Treasurer of the United States has been lost or stolen, without the fault of the payee or a holder who is a special indorsee and whose indorsement is necessary to the further negotiation of such check, (b) that such check has thereafter been negotiated and paid by the Treasurer on a forged indorsement of the payee's or special indorsee's name, (c) that the payee or special indorsee has not participated either directly or indirectly in the proceeds of such negotiation or payment, and (d) that reclamation from the forger or transferees or parties on such check subsequent to the forgery has been or may be delayed or be unsuccessful, the Treasurer of the United States is authorized and directed to draw on the fund prior to reclamation to pay such payee or special indorsee the amount of such check, without interest. Nov. 21, 1941, c. 489, § 2, 55 Stat. 777.

CALIFORNIA PROBATE CODE SECTIONS

§ 541.1. *Reduction of Bond on Deposit of Securities —Deposit by Petitioner.*—Notwithstanding the provisions of Section 541, in any proceedings for the determination of the amount of bond to be required of the executor or administrator (whether at the time of appointment or subsequently), when it appears that the estate of the decedent includes money or securities which have been, or will be, deposited in a bank or banks in this State or in a trust company authorized to transact a trust business in this State or money which has been, or will be, invested in an account or accounts in an insured savings and loan association or associations upon condition that such money or securities will not be withdrawn except on authorization of the court, the court may, in its discretion, order such money or securities so deposited or such money so invested and may exclude such deposited property from the computation of the amount of such bond or reduce the amount of bond to be required in respect of such money or securities to such an amount as it may deem reasonable.

The petitioner for letters testamentary or of administration may deliver to any such bank or trust company any such money or securities in his possession or may deliver to any such association any such money in his possession or may allow such bank or trust company to retain any such money or securities already in its possession or may allow such association to retain any such money already invested with it; and, in either event, the petitioner shall secure and file with the court a written receipt including the agree-

ment of the bank or trust company or association that such money or securities shall not be allowed to be withdrawn except on authorization of the court. In so receiving and retaining such money or securities, the bank or trust company or association shall be protected to the same extent as though it had received the same from a person to whom letters testamentary or of administration had been issued.

The term "account in an insured savings and loan association" used in this section has the same meaning as in Section 1431 of the Probate Code.

§ 1500. *Care of Ward's Person and Estate.*—Every guardian has the care and custody of the person of his ward and the management of his estate, or the care and custody of the person of his ward or the management of his estate, according to the order of appointment, until legally discharged, or until his ward is restored to capacity pursuant to Chapter 5 (commencing with Section 1470) of this division, whichever shall occur first, or, in case of the guardianship of the person of a minor, until the minor reaches the age of majority or marries, or, as to the guardianship of his estate, until the ward attains his majority as provided in Section 25 of the Civil Code. The guardian of a minor also has charge of the education of the minor. The guardian of the person of a ward may fix the residence of the ward at any place in the State, but not elsewhere without the permission of the court.

§ 1501. *Collection of Assets—Payment of Debts—Compromises—Appearances in Court.*—Every guard-

ian must pay the ward's just debts out of the ward's personal estate and the income of his real estate, if sufficient; if not, then out of his real estate upon selling or mortgaging or giving a deed of trust upon any of his real property as hereinafter provided. He must demand, sue for, and collect all debts due to the ward, or, with the approval of the court, he may give the debtor a discharge upon such terms as may appear to the court to be for the best interest of the estate of the ward. He must appear for and represent his ward in all actions and proceedings, unless another person is appointed for that purpose.

§ 1513. *Deposit of Funds Discharges Guardian.*—A guardian may deposit any money belonging to the ward with one or more banks within this State or invest any such money in an account or accounts in one or more insured savings and loan associations, whereupon he shall be discharged from further care or responsibility therefor until the money is withdrawn by him. Unless the money is deposited pursuant to an order, under the provisions of the Bank Act, or is invested pursuant to an order, under the provisions of the Savings and Loan Association Law, it may be withdrawn without order of court. The term "account or accounts in one or more insured savings and loan associations" used in this section has the same meaning as the corresponding term in Section 1431 of the Probate Code.

§ 1755. *Termination of Conservatorship.*—Every conservatorship shall continue until the authority of the conservator is terminated by the death of the

conservator or by order of court, or, subject to the duty of the conservator to see to the custody and conservation of the estate pending the delivery thereof to the personal representative of the conservatee's estate, by the death of the conservatee. Any conservator, the conservatee, or any relative or friend of the conservatee may apply by verified petition to the superior court of the county in which the proceedings are pending to have the conservatorship terminated. Said petition shall state the facts alleged to establish that the conservatorship is no longer required. The petition shall be set for hearing and notice thereof given to the persons and in the same manner as is provided in this chapter for a petition for the appointment of a conservator. The conservator in such case, if he is not the petitioner or has not joined in the petition, shall, if he is a resident of this state, be personally served with a notice of the time and place of the hearing accompanied by a copy of the petition at least five (5) days prior to the hearing. If the conservator is not a resident of this state or cannot be found therein after diligent search, the court may fix the manner of giving notice to him by mail, publication or otherwise as the court deems best or the court may dispense with such notice. The conservator or any relative or friend of the conservatee may appear and oppose the petition. The court shall hear and determine the matter according to the laws and procedure relating to the trial of civil action, including trial by jury if demanded. If it is determined that the conservatorship is no longer required, the conservatorship shall cease. If the petition alleges and if

it is determined that the conservatee is able to properly care for himself and for his property the court shall make such finding and enter judgment accordingly. The conservator may at said hearing, or thereafter on further notice and hearing, be discharged and his bond exonerated upon the settlement and approval of his final account by the court.

§ 1801. *Oath—Letters of Conservatorship.*—A conservator shall be designated by that title. Before his appointment shall be effective, he must take an oath that he will perform the duties of his office according to law, which oath shall be filed in the proceedings. The appointment as conservator and the taking and filing of such oath shall thereafter be evidenced by the issuance by the clerk of the court of letters of conservatorship in substantially the same form as letters of administration.

§ 1802. *Bond.*—The court in the order appointing a conservator of the estate or of the person and estate of another may, in its discretion, in any case in which the proposed conservatee as petitioner has waived the filing of bond, dispense with the filing of bond. In all other cases the conservator of the estate or of the person and estate of another before receiving letters of conservatorship, must give a bond for the protection of the conservatee and of all persons interested in his estate, in an amount fixed by the court, which amount shall not exceed the bond required of a person appointed administrator. The court may reduce the bond required in this section in the manner provided in Section 541.1 of this code.

Unless required by the court in its discretion, no bond shall be required of a conservator appointed only as conservator of the person or the conservatee. Two or more conservators in one proceeding may give a joint bond.

§ 1852. *Same Powers as Guardian of Incompetent.* —Every conservator of the estate or of the person and the estate of a conservatee shall have the powers granted to a guardian of the estate or of the person and estate of an incompetent in Chapters 7, 8 and 9 of Division 4 of this code, and, if granted by the court, the additional powers authorized by Section 1853 of this code.

§ 1853. *Application for Additional Powers.*—On the application of the conservator, made at any time, which application may be included in a petition filed pursuant to Section 1754 of this code, the court may grant to a conservator of the estate or of the person and estate of a conservatee, the following additional powers, which may be exercised with or without notice, hearings, confirmation, or approval of the court:

To institute and maintain all actions and other proceedings for the benefit of and to defend all actions and other proceedings against the conservatee or the conservatorship estate; to take, collect and hold the property of the conservatee; to contract for the conservatorship and to perform outstanding contracts and thereby bind the conservatorship estate; to operate at the risk of the estate any business, farm or enterprise, constituting an asset of the conservatorship, to grant and take options; to sell at public or private sale; to

create by grant or otherwise easements and servitudes; to borrow money and give security for the repayment thereof; to purchase real or personal property; to alter, improve and repair or raze, replace and rebuild conservatorship property; to let or lease property for any purpose including exploration for and removal of gas, oil and other minerals and natural resources and for any period, including a term commencing at a future time; to loan money on adequate security; to exchange conservatorship property; to sell on credit provided that any unpaid portion of the selling price shall be adequately secured; to vote in person or by proxy all shares and securities held by the conservator; to exercise stock rights and stock options; to participate in and become subject and to consent to the provisions of any voting trust and of any reorganization, consolidation, merger, dissolution, liquidation or other modification or adjustment affecting conservatorship property; to effect necessary insurance for the proper protection of the estate, to pay, collect, compromise, arbitrate or otherwise adjust any and all claims, debts or demands upon the conservatorship, including those for taxes; to abandon valueless property and to employ attorneys, accountants, investment counsel, agents, depositaries and employees and to pay the expense therefor from the conservatorship estate.

Said additional powers shall be in addition to the general powers of conservators. The granting of said additional powers shall be discretionary with the court. Notice of the hearing of the application therefor, except when the application is included in a pe-

tition filed pursuant to Section 1754 of this code, shall be given in the manner provided in Section 1200 of this code and whenever any conservatee is or has been during the conservatorship confined in a state hospital in this State, such notice shall also be given by the conservator to the Director of Mental Hygiene at his office in Sacramento. When additional powers are granted to a conservator, his letters shall state that he has the powers authorized in this section. If such additional powers are granted by a subsequent order, *new letters shall be issued and shall state that he has such power or powers as have been granted.* The grant of additional powers to the conservator shall not affect the right of the conservator to petition the court as provided in Section 1860.

§ 1855. *Priority of Maintenance Costs.*—The conservator shall, to the extent of the net estate available and as a prior charge thereon, provide for the maintenance and support of the conservatee and of those legally entitled to support and maintenance from the conservatee.

§ 1858. *Payment of Debts and Expenses.*—The conservator shall pay from any principal and income of the estate of the conservatee any debts incurred by the conservatee before the creation of the conservatorship; and he shall pay any debts incurred by the conservatee after the creation of the conservatorship, except that ability to continue to provide the conservatee with the necessaries of life, out of the estate, shall not be impaired. The conservator shall pay debts incurred by the conservatee during the con-

servatorship for the necessaries of life, and may deduct the amount thereof from any allowance otherwise payable to the conservatee, and shall pay any expenses of the conservatorship. The conservator shall pay any other debts incurred by the conservatee during the conservatorship only if they appear to be such as a reasonably prudent person might incur. The conservator may petition the court for instructions when there is doubt whether a debt should be paid under the foregoing rules. The conservator may advance funds for the benefit of the conservatee or of his estate and may reimburse himself for such advances out of the income and principal of the estate first available.

§ 1951. *Grounds for Removal.*—A conservator, however appointed, may be removed by the court, after notice and hearing as provided by Section 1755, for any of the following causes:

1. For waste or mismanagement of the estate, or abuse of his trust;

2. For failure to file an inventory or to render an account within the time allowed by law or by court order, or for continued failure to perform his duties;

3. For incapacity to perform his duties suitably;

4. For gross immorality or conviction of a felony;

5. For having an interest adverse to the faithful performance of his trust;

6. In case of a conservator of an estate, for insolvency or bankruptcy; or

7. When the conservatorship is no longer required.

8. In any other case in which the court shall in its discretion deem such removal to be for the best interests of the conservatee.

§ 1952. *Suspension Pending Inquiry.*—The court, on its own motion or whenever it appears to it from a verified petition filed in the proceedings that the conservatee or his estate may suffer loss or injury during the time required for notice and hearing under Section 1951, may compel the conservator to surrender the estate of the conservatee to a custodian designated by the court and, pending notice and hearing, may suspend the powers of the conservator to such extent as the court deems necessary.

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1971

NO. 71-333

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner,

vs.

UNITED STATES OF AMERICA and ETHEL OLSON and LILLIAN SEARLE as Co-Administratrices of the Estate of Sarilla L. Whitlock, Deceased, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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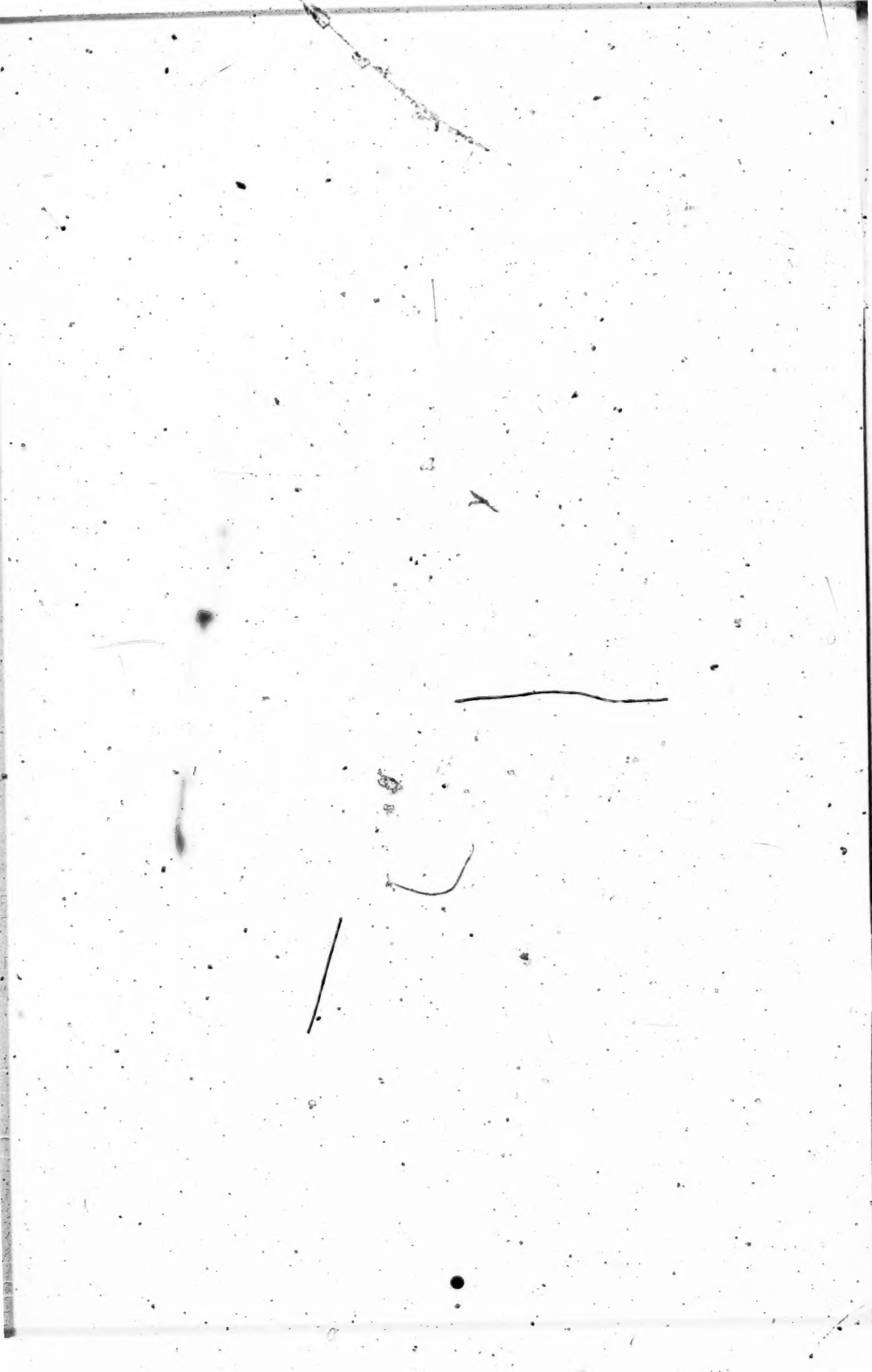
QUESTION PRESENTED

Petitioner has not properly stated the issues. This case does not involve the termination of a conservator's authority nor does it involve the authority of a conservator to endorse any check. The sole question here presented is whether Mr. Houlihan, as conservator of Mrs. Whitlock's estate, had the authority to redeem the bonds and to cash those checks issued in redemption thereof. Moreover, Petitioner's attempted distinction between the authority to redeem the bonds and the authority to endorse the checks is groundless; surely, the latter could not exist without the former.



STATEMENT OF THE CASE

A few addenda to Petitioner's statement of this case are necessary so that the Court may fully understand the extent of Mr. Houlihan's wrongful conduct, which culminated in the forgeries of Mrs. Whitlock's signature.

The reduction of the conservatorship bond by the California probate court was not made merely on Mr. Houlihan's representation that he would deposit the savings bonds in United California Bank; such deposit was an express condition to the issuance of the reduction order. Thus, as of the date of the reduction order, Mr. Houlihan's authority over the bonds ceased completely. Any action on the part of Mr. Houlihan with respect to such bonds other than depositing them was wrongful.

The redemption of the savings bonds by Mr. Houlihan was as attorney and not as conservator. Similarly, the deposits by Mr. Houlihan of the checks representing the proceeds (each of which was payable to Mrs. Whitlock and not to Mr. Houlihan as conservator) were not in a trustee or conservatorship account, but in an overdrawn personal account. There were no endorsements by Mr. Houlihan as conservator, and Mrs. Whitlock's signature was simulated. One of the checks was deposited in an unrelated estate account (Estate of John Joseph Betmon) to cover Mr. Houlihan's prior misappropriations from that estate; the other checks were deposited in Mr. Houlihan's personal accounts. No mention of the conservatorship was made in any of these endorsements.

REASONS FOR DENYING THE WRIT

1. The decision below, in holding the conservator without authority to redeem the bonds or endorse the checks, correctly applied California law.

As pointed out by the Court of Claims in its opinion, Mr. Houlihan was without authority for two reasons: because he violated the court order and under general principles of California conservatorship law.

(a) The conservator was without authority because he violated the court order.

The specific order of the California probate court reducing the conservatorship bond was conditioned on Mr. Houlihan's express representations in his petition for reduction of the bond that he would deposit the bonds in the United California Bank, "subject to withdrawal only upon further order of this Court." Thus, Mr. Houlihan had no authority with respect to the bonds except to deposit them. He had no authority to redeem the bonds except by order of the court. In fact, he had no authority even to have them in his possession. The redemption of the bonds and the endorsement of the checks representing the proceeds of the bonds were thus in direct violation of the conditions upon which the court based its order reducing the bond.

Contrary to Petitioner's contention, such court order involved neither termination nor suspension of Mr. Houihan's authority; it merely imposed a reasonable condition upon the exercise thereof. When he violated that condition, Mr. Houlihan clearly exceeded his authority.

(b) The conservator was without authority under well settled principles of California law pertaining to conservatorships.

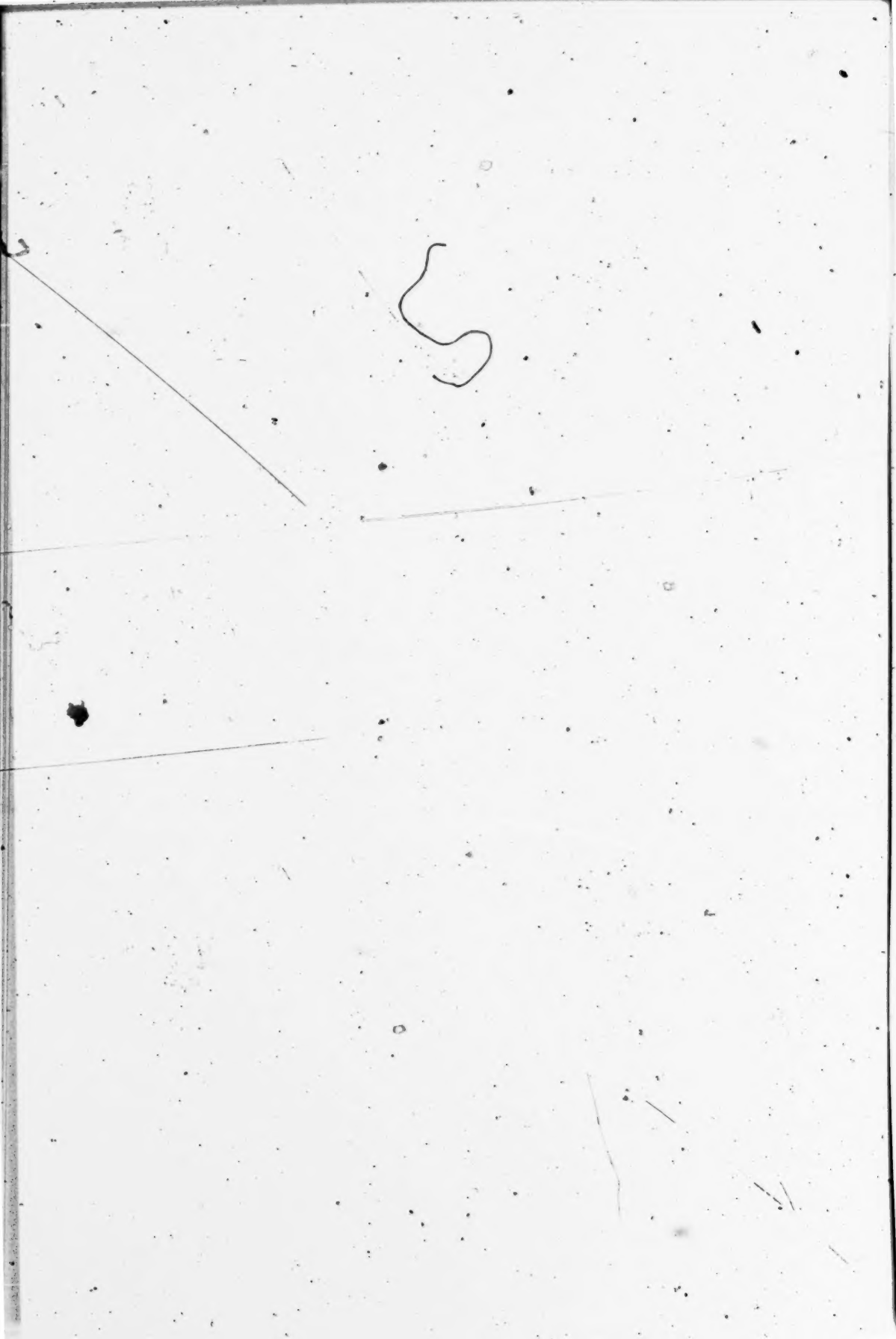
California Probate Code Section 1852 grants to conservators the same powers as are given to a guardian, "and if granted by the court, the additional powers authorized by Section 1853 of this code" (Emphasis added). The additional powers of Section 1853 include, inter alia, the power

> ***[T]o take, collect and hold the property of the conservatee; to contract for the conservatorship and to perform outstanding contracts and thereby bind the conservatorship estate;***to sell at public or private sale;***to exchange conservatorship property;***

In order to exercise Section 1853 powers an order of the probate court is required, after application, notice, and hearing. Such additional powers must also be set forth on the face of the letters of conservatorship. These requirements were not complied with and no such additional powers were granted to Mr. Houlihan by the court. Furthermore, no such additional powers were set forth on the face of the letters of conservatorship. The Court of Claims properly concluded that Mr. Houlihan derived no authority from Section 1853.

The clear import of Sections 1852 and 1853, read together, is that the general powers given by Section 1852 do not encompass the powers listed specifically under Section 1853. Powers would not be given under Section 1853 if they had already been granted in Section 1852. Thus, since the authority to redeem bonds and cash checks is derived from Section 1853, it cannot be derived from Section 1852.

Nor do the guardianship provisions incorporated by Section 1852 aid petitioner. The general powers and duties of



a guardian are found in California Probate Code, Sections 1500 through 1540. None of these sections give a guardian the right to sell or redeem bonds and to cash the checks issued in payment thereof without a court order or without court approval. In fact, these sections specifically require court approval. Section 1530 reads in part as follows:

> If the income of an estate under guardianship is insufficient for the support, maintenance and education of a ward***or if the personal estate and the income from the real estate is insufficient to pay his debts, or if it is for the advantage, benefit and best interest of the estate or ward ***his guardian may sell any of his real or personal property, or mortgage or give a deed of trust upon any of his real property for any such purposes, subject to authorization, confirmation or direction by the Court as hereinafter provided (Emphasis added).

Not only did Mr. Houlihan fail to obtain court authorization, but there was no insufficiency of income for the support of Mrs. Whitlock as a basis for such authorization as contemplated by the statute.

Similarly, an exchange of property by the conservator, acting under general guardianship powers would require court approval under Section 1540, which reads in part:

> When property can be exchanged to the advantage and best interest of the ward and such members of his family as he is legally bound to support and maintain, after hearing before the court, conveyances to effectuate such exchange may be executed to the person with whom such exchange is made by the guardian*** (Emphasis added).

California Appellate Courts have interpreted the law to mean that court approval is necessary to give a guardian

authority to sell the property of his ward. In Katz v. Greeninger, 96 Cal.App.2d 245, 249; 215. P.2d 121, 124 (1950), the court said, "While the guardian has the right of possession and control, the property is said to be 'in custodia legis' and subject to the orders of the court." The court there adopted the view that a guardian is without power, in the absence of a court order, to withdraw funds from the ward's estate if the withdrawal is not needed for the support of the ward. Redemption of the bonds was not needed for the support of Mrs. Whitlock; her average monthly income during the conservatorship proceeding was $850.00, while the average monthly expenditures were $500.00. The court in Katz further stated: "But even in those cases which permit a withdrawal for maintenance the better reasoned ones tie the power of the guardian to the supervision and control of the court" (Ibid.). In Guardianship of Wood, 193 Cal.App.2d 260, 266; 14 Cal.Rptr. 147, 151 (1961), the court stated: "If the income from the ward's property then became insufficient for the ward's support and maintenance, the guardian's remedy consisted of an application to the court; she could sell any of the ward's real or personal property: 'subject to authorization, confirmation or direction by the court***' (Probate Code §1530)" (Emphasis added).*

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* The case cited by petitioner, Southern Trust and Commercial Bank v. San Diego Savings Bank, 45 Cal.App. 294; 187 Pac. 435 (1919), is clearly distinguishable. This case involved the cashing of a check by a guardian two days before letters of guardianship issued but after the order of appointment and posting of bond. The only disputed issue was the drawing of the check before the issuance of letters of guardianship. The decision does not decide the issue of the guardian's general authority to issue checks on a proper guardianship account and does not deal with endorsement in the incompetent's name of checks by the guardian without mention of the guardianship.

2. There are no important federal questions here involved.

Petitioner contends that if the decision of the court below is allowed to stand, banks and others who cash Treasury checks would be put under an unconscionable burden and the very negotiability of Treasury checks would be placed in jeopardy. A review of the facts, however, clearly shows that such was far from the case in this action.

The undisputed facts are that Mr. Houlihan did not endorse the checks as conservator. In two instances, only the simulated signatures of Mrs. Whitlock appear. In two other instances, the simulated signature of Mrs. Whitlock is followed by Mr. Houlihan's signature as a blank endorsement. There is absolutely no evidence whatsoever that Petitioner was relying upon any conservator's powers to endorse. In fact, the inference is clear that had the bank known of the conservatorship relationship of Mr. Houlihan, as would have been revealed by a proper endorsement in his representative capacity, it would have been alerted to transactions and would have avoided the loss. Had the check been endorsed in the usual and proper form, "Sarilla L. Whitlock by John C. Houlihan Conservator" and deposited as it was in Mr. Houlihan's personal account, which was overdrawn, Petitioner would have been charged with notice of breach of fiduciary duty and would have been denied the status of a holder in due course under California Commercial Code Section 3304(2). Moreover, the form of the endorsement was not only inconsistent with Mr. Houlihan's representative capacity, but contrary to the Treasury Department's regulations in Title 31 Code of Federal Regulations Section 360.3, prior to their amendment in 1970.

It is thus clear that Petitioner was under no "unconscionable burden," nor, indeed, any burden other than to accept checks with proper endorsement, the same burden that Petitioner has as respects all checks, and not just Treasury checks.*

CONCLUSION

Because the Court of Claims properly applied California law and because there are no significant Federal questions here involved, the petition for writ of certiorari should be denied.

October 1, 1971.

Respectfully submitted,

Franklin C. Stark
Attorney for Respondents
Ethel Olson and Lillian Searle

Robert C. Field
David M. Lightner
Of Counsel

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* Petitioner's citation of Oquendo v. Federal Reserve Bank of New York, 98 F.2d 708 (2d Cir. 1938), begs the very question at issue here--the question of Mr. Houlihan's authority--for Oquendo involved an express, general power of attorney to, e.g., "endorse any check or other medium of payment". (98 F.2d at 709).

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No. 71-333

In the Supreme Court of the United States

OCTOBER TERM, 1971

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is an action involving a claim against the Check Forgery Insurance Fund under 31 U.S.C. 561, 564 and 31 C.F.R. 359.0-359.4.

On April 28, 1961, the Superior Court of California appointed John C. Houlihan conservator of the estate of Sarilla Whitlock, an invalid, and required Mr. Houlihan to post a bond of $150,000. Based on Mr. Houlihan's representation that he would deposit certain of Mrs. Whitlock's U.S. Savings Bonds with

the United California Bank, "subject to withdrawal *only* upon [further] order of this Court," the court reduced the conservatorship bond to $50,000 (Pet. App. ii).

Mr. Houlihan, however, did not deposit the bonds, and in 1963 and 1964, without either court approval or Mrs. Whitlock's knowledge, he presented six of the bonds for redemption, requesting that the proceeds be mailed to a former address of Mrs. Whitlock. Pursuant to his instructions, four Treasury checks, payable to Mrs. Whitlock, were issued and mailed to the address where they were obtained by Mr. Houlihan without Mrs. Whitlock's knowledge. All the checks were endorsed by Mr. Houlihan, who signed Mrs. Whitlock's name. On two of the checks, Mr. Houlihan also signed his own name below that of Mrs. Whitlock's simulated signature. Three of these checks were then deposited in the petitioner bank. All four checks were presented to the Treasurer of the United States for payment after having been endorsed by the presenting bank (Pet. App. iii-iv).

In 1965, Mrs. Whitlock died and on September 7, 1966 Mr. Houlihan pleaded guilty to felony grand theft against Mrs. Whitlock's estate. By letter of March 6, 1967, the co-administratrices of the estate filed a claim with the Treasurer of the United States against the Check Forgery Insurance Fund, contending that the estate was entitled to be reimbursed for all money appropriated by Mr. Houlihan. When the Treasurer and the Comptroller General rejected this

claim, the estate filed a petition for review with the United States Court of Claims. The court entered summary judgment in favor of the co-administratrices against the United States and in favor of the United States against the presenting banks, including petitioner, which the United States had impleaded as third-party defendants.

Petitioner seeks review of that portion of the decision below which granted the United States judgment against the third-party defendant banks. The court's decision, however, based upon its conclusion that Mr. Houlihan lacked authority under California law to redeem the bonds and to cash the checks issued in redemption thereof (Pet. App. vi-xii), was correct. Moreover, the scope of a conservator's powers under California law is not a matter warranting review by this Court. *Cf. Estate of Spiegel* v. *Commissioner of Internal Revenue*, 335 U.S. 701, 706-708.

Petitioner's reliance on *Oquendo* v. *Federal Reserve Bank*, 98 F. 2d 708 (C.A. 2), certiorari denied, 305 U.S. 656, for the proposition that Houlihan's endorsement was not a forgery is misplaced. In *Oquendo*, unlike the instant case, the attorney had specific authority to endorse all checks received by his guardian. Based on that broad grant of power, the court there held the attorney's signature did not constitute a forgery.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

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vs.

UNITED STATES OF AMERICA and ETHEL OLSON and LILLIAN SEARLE as Co-Administratrices of the Estate of Sarilla L. Whitlock, Deceased, *Respondents.*

REPLY BRIEF OF BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

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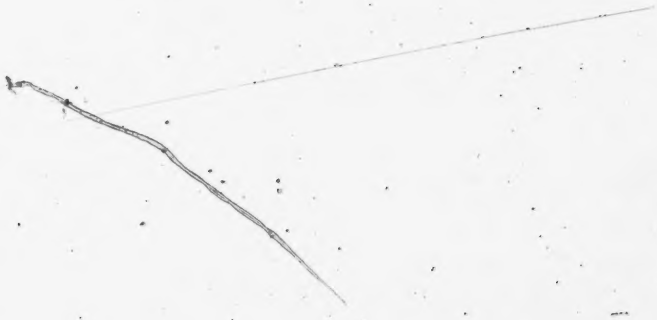

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Respondents.

REPLY BRIEF OF BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

Bank of America National Trust and Savings Association, hereinafter called Bank of America, presents this Reply Brief in answer to the opposition arguments set forth by Respondents United States of America and Ethel Olson and Lillian Searle as Co-Administratrices of the Estate of Sarilla L. Whitlock,

Deceased, the latter hereinafter called Respondent Olson.

ARGUMENT

1. RESPONDENT OLSON MISSTATES THE EFFECT OF THE CONSERVATOR'S MISREPRESENTATIONS TO THE APPOINTING COURT.

Respondent Olson argues (R.B. 3) that Mr. Houlihan's authority as conservator was conditioned upon deposit of certain savings bonds with United California Bank. This is a deceptive and incomplete statement.

In his May 25, 1961, petition to the Superior Court for a reduction in his security bond, Mr. Houlihan represented to the Court that he would deposit certain savings bonds with United California Bank, subject to withdrawal only upon order of the Court (Pet. App. ii). The Superior Court never specifically ordered Mr. Houlihan to deposit savings bonds in United California Bank and never required an acknowledgment from United California Bank that such had been done, as would be proper under Sections 1802 and 541.1 of the *Probate Code* (Pet. App. xvi and xx). Instead, the Court (on May 25, 1961) ordered that letters of conservatorship be issued to Mr. Houlihan upon his posting the reduced bond and on the same day the actual letters of conservatorship were filed and issued:

Petitioner contends, and the Court of Claims agrees, that Mr. Houlihan was appointed conservator and

that the issue in this case is whether Mr. Houlihan, *as conservator,* had the authority to endorse the Treasury checks (Pet. App. vi).

The appointment of Mr. Houlihan was not conditional as Respondent Olson contends (R.B. 3). Nor was the appointment void because of Mr. Houlihan's misrepresentations (P.B. 8 and 9). Under California law, Mr. Houlihan was possessed of those general powers granted by statute to every California conservator and his redemption of savings bonds over a three year period without specific Court approval could not by itself operate to suspend or terminate those general powers. Further, under California law the power of a conservator to endorse checks is a general power.

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2. ARGUMENTS BY RESPONDENT OLSON AS TO THE FORM OF ENDORSEMENT ARE IRRELEVANT

Respondent Olson argues (R.B. 7) that had the checks been endorsed in some other form Petitioner could have avoided this claim. The Court of Claims, however, has made no distinction between the power of a California conservator to redeem savings bonds and the power to endorse checks representing the proceeds of such bonds. *No matter how Mr. Houlihan had endorsed the checks and regardless of the type of account in which deposited, the opinion of the Court of Claims would require a finding of forgery.* Nevertheless, it is well settled that the mere fact that an agent's name does not appear in a negotiable in-

strument, executed or endorsed by him in the name of the principal alone, even where the principal's signature is simulated, does not render the execution or endorsement insufficient. *Kiekhoefer v. United States National Bank of Los Angeles,* 2 Cal.2d 98, 39 P.2d 807, 96 A.L.R. 1251 (1934). Thus, it is the authority to endorse a check and not the physical act of endorsement that determines the validity of the endorsement. In addition, Treasury Department Regulations could not revoke the authority conferred upon Mr. Houlihan. They were made for the convenience and protection of the Treasury and could be and were waived by payment of the checks. *Oquendo v. Federal Reserve Bank of New York,* 98 F.2d 708, 710 (1938).

Both Respondent Olson and The United States of America mistake Petitioner's emphasis on *Oquendo.* That case clearly separates an agent's power to endorse a Treasury check from the agent's scheme to defraud his principal. Petitioner contends that here, as in *Oquendo,* the power of Mr. Houlihan to endorse Treasury checks should have been considered apart from his mishandling of savings bonds and his misrepresentations to the Superior Court. The Treasurer and the Comptroller General of the United States correctly decided that this claim did not involve forgeries within the meaning of the Check Forgery Insurance Fund statute (Pet. App. xv).

CONCLUSION

For the reasons set forth herein and in Bank of America's Petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Claims.

Respectfully submitted,

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Of Counsel.

Dated: October 18, 1971.